No. 89-1313

In the Supreme Court of the United States

OCTOBER TERM, 1989

IRWIN D. BROSS, PETITIONER

v.

EDWARD J. DERWINSKI, SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has standing under the Veterans' Dioxin and Radiation Exposure Compensation Standards Act to obtain judicial review of the Department of Veterans Affairs' evaluation of his scientific research studies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14a-18a) is reported at 889 F.2d 1256. The opinion of the district court (Pet. App. 1a-11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1989. The petition for a writ of certiorari was filed on February 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a research scientist who has conducted studies on the connection between low-level ionizing radiation and cancer. Pet. App. 6a. He seeks review of the court of appeals' ruling that he lacks standing under the Veterans' Dioxin and Radiation Exposure Compensation Standards Act (the Dioxin Act) to challenge the consideration given his research by the Department of Veterans Affairs, formerly the Veterans Administration.[1]

1. The purpose of the Dioxin Act is "to ensure that * * * compensation is provided to veterans who were exposed during service * * * to * * * dioxin or to ionizing radiation * * * for all disabilities arising after that service that are connected, based on sound scientific and medical evidence, to such service * * *." 38 U.S.C. 354 note, § 3 (Supp. V 1987). To further this goal, the Act authorizes the Secretary of the VA to conduct rulemaking to determine which of the diseases claimed to be caused by radiation exposure will be deemed to be service connected for purposes of compensation. 38 U.S.C. 354 note, § 5(a)(1)(B) (Supp. V 1987).

The Act also requires the Secretary to promulgate regulations governing the evaluation of scientific studies relating to the health risks of exposure to

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[1] Subsequent to many of the events in this case, Congress redesignated the Veterans Administration as the Department of Veterans Affairs (see Department of Veterans Affairs Act, Pub. L. No. 100-527, § 1, 102 Stat. 2635 (to be codified at 38 U.S.C. 201 note, § 2)), and provided that, after March 1, 1989, references in other laws to the Veterans Administration and the Administrator would be deemed to refer, respectively, to the Department of Veterans Affairs and the Secretary of Veterans Affairs. § 1, 102 Stat. 2640 (to be codified at 38 U.S.C. 201 note, § 10(1) and (2)).

ionizing radiation. 38 U.S.C. 354 note, § 5(b)(1)(A) (Supp. V 1987). Such evaluations are to be made by the Secretary after receiving advice from the appropriate panel of the Scientific Council (the Council) of the Veterans' Advisory Committee on Environmental Hazards (the Committee). 38 U.S.C. 354 note, § 5(b)(1)(B) (Supp. V 1987).

The Advisory Committee consists of 15 individuals: 11 from the medical and scientific community (three experts in dioxin exposure, three experts in ionizing radiation exposure, and five experts in both fields), plus four members of the general public. 38 U.S.C. 354 note, § 6(a)(1) and (2) (Supp. V 1987). The 11 Committee members from the medical/scientific community also comprise the Scientific Council, which is further divided into two overlapping 8-member panels responsible for the evaluation of studies concerning possible adverse health effects of dioxin and radiation exposure. 38 U.S.C. 354 note, § 6(d)(1) and (2) (Supp. V 1987). The Council is directed to submit to the Committee and the Secretary "periodic reports" on its findings and evaluations of pertinent scientific studies. 38 U.S.C. 354 note, § 6(d)(3) (Supp. V 1987).

The Secretary is required to consider the findings and evaluations of the Council in making his own assessment of the studies. 38 U.S.C. 354 note, § 5(b)(1)(B) (Supp. V 1987); see also 38 C.F.R. 1.17(b)(1)-(5) ("views of the * * * Council" are one of five factors considered by the Secretary in evaluating medical and scientific studies). Pet. App. 43a. The regulations also instruct the Secretary to publish such evaluations "from time to time" in the *Federal Register*. 38 C.F.R. 1.17(a). Pet. App. 42a.

2. In 1985 and 1986 petitioner submitted to the Secretary and the Committee two studies concerning

adverse health effects of veterans' exposure to ionizing radiation. Pet. 10, 13. The studies consisted of a re-analysis of data previously considered by the Council on the effects of exposure to low-level radiation at various nuclear test sites. In his analysis, petitioner disagreed with the Council's previous conclusions that the data showed no significant adverse health effects. Pet. App. 7a.

In its November 1986 meeting, the full Committee reviewed and considered petitioner's studies and determined that they provided no basis for a change in current compensation policy for veterans claiming injury from exposure to ionizing radiation. Pet. 13; Pet. App. 8a. The views of the Committee are contained in the minutes of the meeting, copies of which are available to the public. See 54 Fed. Reg. 31,140 (1989).

3. On September 4, 1987, petitioner filed a complaint in the United States District Court. Among other things, he alleged that the VA failed to publish evaluations of his reports or to refer his studies to the proper subcommittee in violation of pertinent provisions of the Dioxin Act. Pet. App. 3a, 16a. He also claimed that the process employed by the VA in assessing his research—including the selection and composition of the Scientific Council—violated his due process rights, and that the Committee's conclusion that his studies provided no basis for revising VA compensation policy was arbitrary and capricious. Pet. App. 3a.

On March 29, 1989, the district court dismissed the complaint, holding that petitioner lacked standing. The court explained that petitioner had failed to show "injury in fact" from the composition of the Council, and that he likewise suffered no injury from failure to publish evaluations of his studies, because

there was no requirement that studies be published within a definite period of time. Pet. App. 9a. With respect to petitioner's argument that the conclusions of the Committee were arbitrary and capricious, the court indicated that petitioner could claim no harm from the Committee's conclusions because the Administrator was not bound to adopt the recommendations of the Committee. Pet. App. 10a. Finally, the court rejected the due process complaint, finding that petitioner was deprived of no constitutionally protected property interest. Pet. App. 11a.

4. On July 26, 1989, before oral argument in the Second Circuit, the Department published a notice in the Federal Register setting forth its evaluation of petitioner's studies pursuant to the Dioxin Act and the regulations. See 54 Fed. Reg. 31,139-31,140 (1989). The evaluation summarized petitioner's studies and conclusions and reviewed the Committee's comments on the research. See 54 Fed. Reg. 31,140 (1989). The Department noted, *inter alia*, that the Committee had criticized petitioner's work for failing to take into account a relevant statistical phenomenon —the decline over time of the so-called "healthy veteran effect"—and for using a correction factor in its analysis that may have biased the results. *Ibid.* The Committee also believed petitioner's analysis was flawed because it failed to explain the absence of uniform results across veterans exposed to radiation at different sites. *Ibid.* The Department indicated that it concurred in the Committee's analysis and critique of petitioner's research studies. *Ibid.*

5. On November 17, 1989, the court of appeals affirmed the district court decision's dismissing petitioner's complaint. Pet. App. 14a. The court of appeals noted that the Administrative Procedure Act grants the right of judicial review to "[a] person

* * * aggrieved by agency action within the meaning of a relevant statute," Pet. App. 17a (citing 5 U.S.C. 702). But, the court stated, a person suing under Section 702 must show that the interests he asserts are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Pet. App. 17a (citing *Association of Data Processing Serv. Orgs., Inc. (ADPSO)* v. *Camp*, 397 U.S. 150, 153 (1970)). A plaintiff lacks standing to sue, the court explained, if his "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." Pet. App. 17a (citing *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987)).

The court found that petitioner's asserted interest was not within the zone of interests protected by the Act. Pet. App. 17a. The court suggested that, since the Act is "chiefly centered around the procedures for awarding VA compensation," *ibid.*, a veteran aggrieved by the VA's refusal to consider scientific evidence potentially relevant to his claim for benefits conceivably would have a right to judicial review of an action alleging failure to comply with the Dioxin Act. *Ibid.* The court concluded, however, that petitioner's interest as a scientist in seeking professional and governmental recognition of his views was not "reasonably connected to the awarding of VA benefits [so as] to fall within the Act's zone of interests." *Ibid.*

The court of appeals also decided that, because petitioner had not shown the requisite deprivation of a protected life, liberty, or property interest, the district court properly dismissed petitioner's due process claim. Pet. App. 17a-18a (citing *Board of Regents* v. *Roth*, 408 U.S. 564, 570-572 (1972)).

ARGUMENT

The court below correctly ruled that petitioner lacked standing to challenge the VA's compliance with the Dioxin Act in evaluating his research studies. Because that decision does not conflict with the decisions of other courts of appeals or of this Court, further review is unwarranted.

1. As petitioner recognizes (Pet. 16), standing has both a "constitutional" and a "prudential" dimension. See *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Constitutional standing is established only if the petitioner shows "injury in fact" as a result of the allegedly illegal conduct of the defendant—injury that is "likely to be redressed by a favorable decision." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). To establish prudential standing, petitioner must show that his alleged injury falls "within the zone of interests to be protected or regulated by the statute" in question. *Valley Forge*, 454 U.S. at 475 (quoting *ADPSO* v. *Camp*, 397 U.S. at 153).

a. Petitioner lacks both constitutional and prudential standing. Petitioner contends that he has suffered injury from, *inter alia*, the improper composition and lack of expertise of the Scientific Council and the Advisory Committee; the Scientific Council's failure to evaluate his studies and forward its findings to the Committee and the Secretary; the Advisory Committee's determination that his studies provided no reason to modify VA guidelines; the Advisory Committee's and Department's "improper and unlawful review" of his studies; and the VA's alleged failure to publish evaluations of his studies. Pet. 17-18. But the only concrete injury that petitioner can iden-

tify resulting from these alleged shortcomings is an asserted loss of "income, status, and recognition" because of the government's refusal to credit his scientific work.[2] See Pet. App. 5a; Pet. 19.

The impact of the VA's handling of petitioner's studies on his status and income is speculative at best, since petitioner would gain the "status and recognition" he seeks only if his studies received a favorable evaluation and formed the basis for a change in VA compensation policy. Obviously, however, the Advisory Committee has no obligation under the Dioxin Act to accept petitioner's conclusions as valid. And, as the district court recognized, even if the Advisory Committee approved petitioner's studies, the Secretary would be under no obligation to accept the Advisory Committee's assessment of petitioner's work, or to alter the compensation program based on peti-

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[2] Petitioner cites a number of court of appeals cases (Pet. 19) to support his contention that "procedural and statutory wrongs," without more, constitute injury sufficient for standing. However, in those cases a regulation or statutory provision specifically entitled the complainant either to participate in a decision-making process, see, *e.g.*, *NCPAC* v. *FEC*, 626 F.2d 953, 957-958 (D.C. Cir. 1980), or to obtain review of failure to comply with procedural and other requirements of applicable law, see, *e.g.*, *Committee for Full Employment* v. *Blumenthal*, 606 F.2d 1062, 1065 (D.C. Cir. 1979). In the absence of these special circumstances, petitioner's claim that the mere presence of "procedural and statutory wrongs" confers standing amounts to the *per se* equation of "injury" with an absence of statutory enforcement—a theory that fails to distinguish petitioner from any other citizen seeking agency compliance with a statute. Such a "generalized citizen's interest," however, cannot confer standing. See *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 220-221 (1973); *Warth* v. *Seldin*, 422 U.S. at 498-499.

tioner's findings. Thus, there can be no guarantee that, even if each of the alleged procedural shortcomings petitioner has identified were corrected, he would gain the "income, status, and recognition" he seeks.

b. In addition, petitioner lacks prudential standing because his interest in personal scientific recognition is not within the zone of interests of the statute at issue. See *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 394-403 (1986).

By its own terms, the purpose of the Dioxin Act is "to ensure * * * compensation" to veterans suffering service-connected disability due to ionizing radiation and dioxin exposure "based on sound scientific and medical evidence." 38 U.S.C. 354 note, § 3 (Supp. V. 1987). The provisions that provide for the evaluation of scientific information were clearly designed to advance the statutory goal of ensuring that veterans receive compensation in accordance with "sound scientific and medical" information. The Act contains no suggestion whatsoever of any congressional objective to advance the professional reputation or economic status of scientists such as petitioner who submit their research for consideration by the Department. Indeed the interest of any one researcher in having his studies ratified and his conclusions (whether favorable or unfavorable to veterans) accepted as a basis for veterans' compensation policy may well conflict with that of another researcher seeking similar recognition for his work. Moreover, a scientist presumably would be interested in the endorsement of his work, regardless of its merit or accuracy, and regardless of whether such acceptance was consistent with the overall statutory goal of en-

suring compensation to deserving veterans based on sound scientific data.[3]

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[3] Petitioner claims that he should be allowed to sue for enforcement of the Act because no one else would have standing. As petitioner acknowledges (Pet. 25-26), however, regulations issued by the Department under the Dioxin Act to determine which diseases are service connected are now judicially reviewable under amendments enacted in 1988. See Veterans' Judicial Review Act, Pub. L. No. 100-687, §§ 101(a), 102(a), 102 Stat. 4105, 4106 (to be codified at 38 U.S.C. 211, 223). Petitioner fails to explain why individual veterans or groups of veterans could not petition for rulemaking revisions based on petitioner's scientific studies, and then seek judicial review of any decision by the Secretary taken in response to such a petition. Moreover, it is conceivable, as the court of appeals hypothesized (Pet. App. 17a), that a veteran could contest the VA's alleged failure to consider scientific evidence relevant to his individual claim for benefits. Although judicial review of agency decisions regarding the award of veterans' benefits was unavailable during the time period relevant here, see 38 U.S.C. 211(a), since November 18, 1988, the Court of Veterans Appeals has had jurisdiction to review decisions of the Board of Veterans Appeals concerning claims for benefits. See Pub. L. No. 100-687, §§ 201(a), 301, 102 Stat. 4109, 4113 (to be codified at 38 U.S.C. 4001(b), 4052).

Petitioner also claims (Pet. 27) that he can assert "jus tertii" or third party standing to vindicate the interests of veterans in enforcement of the Act. Petitioner misunderstands the doctrine of third party standing. As a rule, a plaintiff "must assert his own legal rights and interests," not "the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. at 499. An exception has been recognized for certain cases where "practical obstacles prevent a party from asserting rights on behalf of itself." *Maryland* v. *Munson*, 467 U.S. 947, 956 (1983). As indicated above, however, there is no reason to accept petitioner's speculation that veterans have no avenue to pursue their own interests in seeking enforcement of the requirements of the Dioxin

But even if not wholly inconsistent with the purposes of the Act, a researcher's interest in "status, income, and recognition," is at best "marginally related" to the implementation of the core statutory purpose—*i.e.*, compensating veterans for service-related disability. See *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 399. There is consequently "no special reason to suppose that Congress might have thought [such plaintiffs] suitable advocates" of the interests underlying the statute. *Hazardous Waste Treatment Council* v. *EPA*, 861 F.2d 277, 285 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 3157 (1989). Vindication of researchers' interests also "carries a considerable potential for judicial intervention that would distort the regulatory process." *Ibid.*[4]

Act. Also, in order to assert standing to vindicate statutory or constitutional rights of others, a party must still show "injury in fact," *id.* at 954, and also, arguably, must satisfy the prudential requirements of standing so that he can be relied upon "properly [to] frame the issues and present them with the necessary adversarial zeal." *Id.* at 956. See also *id.* at 955 n.5; *Singleton* v. *Wulff*, 428 U.S. 106, 121-122 (1976) (Stevens, J., concurring in part). But see *FAIC Securities, Inc.* v. *United States*, 768 F.2d 352, 357-358 (D.C. Cir. 1985) (expressing doubt that third party must satisfy independent zone of interests requirement).

[4] Petitioner implies (Pet. 26) that the court of appeals' application of the zone of interests test conflicts with decisions of the District of Columbia and Eighth Circuits, which, he alleges, construe the zone of interests test "in a manner which would allow standing here." However, the decisions cited by petitioner are not inconsistent with the decision in this case. In each decision, the court of appeals applied the *Clarke* "zone of interests" test to a would-be plaintiff by analyzing a statutory scheme very different from the one at issue here. See *Hazardous Waste Treatment Council* v. *EPA*, 861 F.2d 277, 282-286 (D.C. Cir. 1988) (standing of national trade

2. Even if petitioner's interests fall within the zone of interests meant to be protected, petitioner's allegations of non-compliance with the Dioxin Act are not judicially reviewable if Congress did not intend that such review would take place. *Clarke*, 479 U.S. at 400. See *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 348-351 (1983). Congress's intent to preclude challenges to the activities of the Advisory Committee under the Dioxin Act is suggested by the existence, in the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 5, 7, 8, of an alternative mechanism for oversight of such purely advisory bodies. This alternative form of review is provided not by federal courts, but by Congress, the Director of the Office of Management and Budget, and the head of the agency to which the Advisory Committee reports.[5] Judicial oversight at the behest of private

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organization of firms engaged in the treatment of hazardous waste to challenge rules concerning burning of hazardous waste under the Resource Conservation and Recovery Act), cert. denied, 109 S. Ct. 3157 (1989); *DeLoss* v. *HUD*, 822 F.2d 1460, 1464-1466 (8th Cir. 1987) (standing of owners of rental property suitable for housing low-income elderly to challenge HUD decision to subsidize low income project); *Investment Co.* v. *FDIC*, 815 F.2d 1540, 1543-1546 (D.C. Cir.) (standing of representatives of mutual funds and investment bankers to challenge FDIC regulations permitting certain non-member banks to affiliate with firms engaged in securities work, alleging violation of the Glass-Steagall Act and the Federal Deposit Insurance Act), cert. denied, 484 U.S. 847 (1987). In so doing, these courts said nothing to undermine the validity of the court of appeals' assessment of the purposes and structure of the Dioxin Act as it relates to petitioner's standing to challenge the VA's action here.

[5] As the D.C. Circuit observed in *Metcalf* v. *National Petroleum Council*, 553 F.2d 176, 182 (1977):

> The point to be drawn from these review provisions in FACA is that federal advisory committees * * *

citizens would seriously disrupt and interfere with this elaborate process of continuous monitoring of advisory committees by Congress and the Executive. It is unlikely, then, that Congress intended to permit individuals such as petitioner to enforce compliance of specific requirements relating to the function of such committees.

3. In any event, review by this Court is unwarranted because the VA has fully complied with the provisions of the Act that petitioner seeks to enforce. Petitioner concedes (Pet. 13) that the full Advisory Committee met in November 1986 and that, at that time, the two studies he had submitted were reviewed and evaluated.[8] Contrary to petitioner's assertion, *ibid.*, his studies were evaluated by the Scientific Council (see 54 Fed. Reg. 31,139 (1989)), which is a component of the Committee, and includes the radiation panel as the Council subdivision specifically

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undergo close periodic examination by sources both within and without the agencies which charter or utilize the committees. In addition, the committees of Congress are given very broad power to correct what they may perceive to be *any* difficulty in the operation of the advisory committees and are *required* by the statute to exercise their review power on a continuing basis. Also it is appropriate to observe that those who are charged with the responsibility to review advisory committee activities by FACA are more closely associated with and possess more expertise in the subject areas in which the various advisory committee [*sic*] operate than the federal courts.

[8] Although petitioner refers at several points to four studies, see, *e.g.*, Pet. 7 n.2, 10-11, the district court found that petitioner submitted only two studies to the Department for review because he believed that submission of two other studies would be "futile." Pet. App. 3a n.2.

responsible for reviewing studies on radiation such as petitioner's. 38 U.S.C. 354 note, § 6(d)(2) (Supp. V 1987). The Council's views and findings were reflected in the minutes of the Committee meeting. See 54 Fed. Reg. 31,139, 31,140 (1989).

Since the Committee as a whole was present when the Council reviewed the studies and made its findings, it is clear that the Council's findings were "submitted" to the Committee as required by 38 U.S.C. 354 note, § 6(d)(3) (Supp. V 1987). It is also clear that the Council's findings were thereafter submitted to the Secretary, as required, see *ibid.*, since the Secretary took those views into account in subsequently developing and publishing his own evaluation of the studies. See 54 Fed. Reg. 31,140 (1989). In publishing his evaluation, the Secretary fully complied with 38 U.S.C. 354 note, § 5(b)(1) (Supp. V 1987) and 38 C.F.R. 1.17(a).[7] There is thus no basis for petitioner's various charges (see Pet. 13-14, 17-18) that his papers were denied proper consideration under the Act.[8]

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[7] As a result of the decision in *Nehmer* v. *United States Veterans' Admin.*, 712 F. Supp. 1404 (N.D. Cal. 1989), the Department recently amended its regulations governing the evaluation of scientific and medical studies to establish criteria for determining when a significant statistical association exists between exposure to dioxin or ionizing radiation and specific diseases. See 54 Fed. Reg. 40,388, 40,391-40,392 (1989) (to be codified in 38 C.F.R. 1.17(a)-(f)). This regulation, rather than the version that applies to petitioner's case, will govern future cases.

[8] Petitioner also complains (Pet. 18) that the Scientific Council lacked the expertise to evaluate his studies. However, petitioner has pointed to no statutory provision or regulation

4. Petitioner's claim of a due process violation (Pet. 28-29) must also fail. The principal basis for that claim is an alleged "protectable property interest" in findings and evaluations by the Secretary, the Committee, and the Council. *Ibid.* As the district court recognized, however, petitioner's constitutional claim is nothing more than a restatement of his complaints concerning "deficiencies in the process *per se* employed by the defendants." Pet. App. 11a. See also Pet. App. 17a-18a. Even if petitioner possessed such a "property interest" in the outcome of the VA's deliberations, the Department has not deprived him of it, as it has made findings and published evaluations of petitioner's studies. Petitioner's further allegation that Committee members circulated "erroneous, libelous, and misleading" statements about his work in the course of their 1986 deliberations, thereby depriving petitioner of a "liberty interest" (Pet. 29), is similarly insufficient to give rise to a due process claim. Simple defamation, unconnected to any deprivation of rights guaranteed by statute, does not amount to a deprivation of liberty in violation of the Due Process Clause of the Constitution. *Paul* v. *Davis*, 424 U.S. 693, 708-709 (1976).

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that was violated by the composition or method of selection of the members of the Council. Petitioner also challenges the Committee's decision not to recommend modification of the VA's guidelines for awarding compensation to radiation victims, but once again does not explain why the Committee was obligated by law to endorse petitioner's conclusions or recommend a revision in compensation guidelines based on them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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